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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-474

MARY ELLEN SCHATTMAN,
Petitioner,

vs.

TEXAS EMPLOYMENT COMMISSION, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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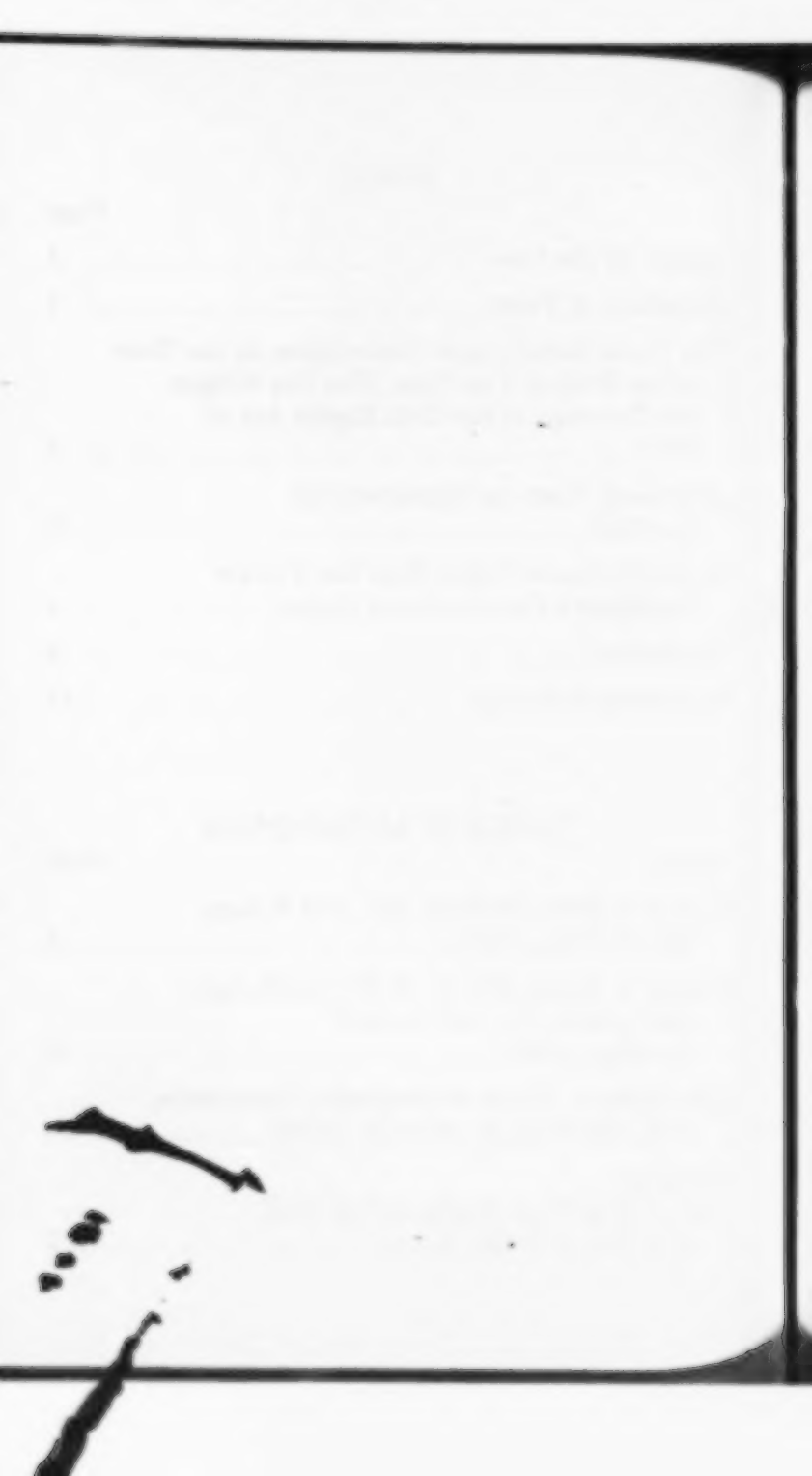

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Nature of the Case

This is a suit by a State employee (Petitioner) against a State agency and some of its employees (Respondents). The two issues in the case are: (1) whether Respondents' maternity leave policy unlawfully discriminates against Petitioner because of her sex—by virtue of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.); and (2), whether such policy is reasonable within the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The opinion of the United States Court of Appeals for the Fifth Circuit correctly answered both of these questions.

Statement of Facts

Respondents' maternity leave policy provides that:

> "No employee anticipating maternity confinement may remain in active service with the Commission later than two months before the expected delivery date."

The evidence shows that to properly perform their respective functions, State governmental departments necessarily must have maternity leave policies applicable to all employees and that the maternity leave policy of the Texas Employment Commission was reasonable and necessary for the Commission to properly perform its required services. Dr. Morris D. McCauley, the Chief of the Obstetrical Division at Seton Hospital in Austin, Texas, for 18 years and a practicing obstetrician and gynecologist for 34 years, testified that Respondents' maternity leave policy was reasonable and necessary for the efficient operation of the Texas Employment Commission and that a seven month pregnant woman could not perform her duties as an employee efficiently. This witness had delivered more than 10,000 babies and was an expert on the physical condition of pregnant women, especially during their eighth and ninth months of pregnancy. The evidence showed that Petitioner was sick and dizzy in the office during her seventh month of pregnancy just before her employment was terminated. The testimony also showed that the Texas Employment Commission had more than 3600 employees, that the maternity leave policy applied to all employees, and that such policy was required to efficiently perform the work of the Texas Employment Commission.

Petitioner was reemployed by the Texas Employment Commission on January 4, 1971, at the same salary she was receiving when she took her leave of absence less than two months before her baby was born.

The Texas Employment Commission, at the Time of the Trial of This Case, Was Not Within the Coverage of the Civil Rights Act of 1964

The Federal Civil Rights Act of 1964 (42 U.S.C. § 2000e(b)), as written at the time of the trial of this case in the United States District Court, was not applicable to a State governmental department and its employees. Section 2000e(b), in part, provides as follows:

> "The term 'employer' . . . does not include . . . a state or political subdivision thereof, . . ."

On page 17 of the opinion of the United States Court of Appeals for the Fifth Circuit (page 14a of the Appendix to the Petition), said court held as follows:

> "In the absence of any legislative history to the contrary, we look to the plain language of Congress and hold that the State of Texas is not an employer whose employees are covered by the Act and this includes all employees alike. The Texas Employment Commission as a State agency was excluded from coverage, Sec. 2000e(b)(1), and the district court was without jurisdiction of this complaint as a purported violation of the Civil Rights Act of 1964."

The Civil Rights Act of 1964 has been amended since the trial of this case, as stated in Petitioner's pleading on page 8, and she has now conceded that the appellate court below was correct in its holding on this issue.

Additional Facts on Constitutional Questions

The existence of a seven months fetus is the sole cause for the application of the maternity leave policy, not the sex of its host. Once the fetus, as such, no longer relies upon its host for sustenance and development, the maternity leave policy is no longer applied; therefore, it is elementary that the existence of the fetus is

the sole and only determinable cause for the application of the policy. The sex of its host is incidental to the application of the rule.

The maternity leave policy applied equally to all 3600 employees of the Texas Employment Commission. As stated by the Fifth Circuit, Petitioner's employment was not terminated because she was a woman or because she became pregnant but only because her pregnancy was far advanced. Under the evidence in this case, the maternity leave policy was a reasonable and necessary regulation made by the Commission in order to enable it to properly perform its functions.

Maternity Leave Policy Does Not Violate Petitioner's Constitutional Rights

The Fifth Circuit, at 459 F.2d 39-41, correctly analyzed the facts and applied the law in the following language:

> "On the other hand, the Court also heard the testimony of Dr. M. D. McCauley, an obstetrician and gynecologist, a graduate of the University of Michigan, who was then fifty-eight years old and had practiced medicine thirty-four years. He had presided at the delivery of over 10,000 babies. For eighteen years he had been Chief of the Obstetrical Division at Seton Hospital.
>
> "Dr. McCauley said:
>
> 'We have some thirty-two susceptible young women there who are a constant problem in all phases of their work, starting in the last trimester of pregnancy.'
>
> "Dr. McCauley further testified that there is a change in the efficiency of a working woman after

the sixth or seventh month of pregnancy; that, in his opinion, a regulation releasing women from their employment after the sixth or seventh month of pregnancy was reasonable; that in a woman after reaching the seventh month of swelling of the limbs is very prevalent, especially in the summer; their ability to get around necessitates help and assistance from other employees; jobs they had been able to do themselves they now require help with, or they are unable to do them; they are frequently given to headaches, little irritable things; their personalities change quite a bit; and they are not only hard to live with but they are hard to employ. He further testified that women in that condition are frequently running to the bathroom or after a small bite of food or to loosen their garments because they are too tight.

"The District Court made no findings as between the testimony of Dr. Blewett and Dr. McCauley. He held that 'by virtue of female physiology the Defendants' policy applies solely to women'. This is no doubt true but the fact that only a woman can be pregnant does not nullify the pregnancy nor the ensuing physical conditions.

"The record further shows that one Texas agency terminates its women employees at the end of the fifth month of pregnancy and others at the end of six months. Still others terminate at the end of the seventh month.

"The most recent case before the Supreme Court on State classification by sex is Reed v. Reed, decided November 22, 1971, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.

"It was there stated, 92 S.Ct. at 251, that in applying the Equal Protection Clause the Supreme Court has consistently recognized that the Fourteenth Amendment does not deny the States the power to treat different classes of persons in dif-

ferent ways. The Clause *does prohibit* the States from placing people in different classes 'on the basis of criteria wholly unrelated to the objective of that statute' (in our case, a regulation). Additionally, the Supreme Court said, 'A classification "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" '. The conclusion was that dissimilar treatment for men and women who are *similarly situated* violates the Equal Protection Clause.

"We are also aware that the Supreme Court has said in comparatively recent times (1960) that a 'statutory (regulatory) discrimination will not be set aside if any facts reasonably may be conceived to justify it', McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

"See, also, an older case, Lindsley v. National Carbonic Gas Co., 1911, 220 U.S. 61, 78-79, 31 S.Ct. 337, 55 L.Ed. 369, cited in Reed, supra, and the decision of the Three Judge Court, 316 F.Supp. 134,136 (Judges Haynesworth, Hemphill, and Russell) dealing with a man claiming that he had a constitutional right to gain admission to a college maintained exclusively for girls:

"The Equal Protection Clause of the Fourteenth Amendment does not require "identity of treatment" for all citizens (Walters v. City of St. Louis (1954) 347 U.S. 231, 237, 74 S.Ct. 505, 98 L.Ed. 660), or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups (Griffin v. Board of Sup'rs of Prince Edward County (1964) 377 U.S. 218, 230, 84 S.Ct. 1226, 12 L.Ed.2d 256). It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the

Equal Protection Clause. (McGowan v. Maryland (1961) 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393). Specifically, a legislative classification based on sex, has often been held to be constitutionally permissible. See West Coast Hotel Co. v. Parrish (1937) 300 U.S. 379, 394-395, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330 (statute providing minimum wages for women but not men); Radice v. New York (1924) 264 U.S. 292, 296-298, 44 S.Ct. 325, 68 L.Ed. 690 (special statute limiting hours of night work of women in cities with a particular population); Goesaert v. Cleary (1948) 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (proscribing use of women as licensed bartenders) (cf. McCrimmon v. Daley (7 Cir. 1969) 418 F.2d 366, 369-371; and Seidenberg v. McSorleys' Old Ale House, Inc. (D.C.N.Y. 1969) 308 F.Supp. 1253, 1260 ***); Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (jury duty voluntary for women but compulsory for men). (On the other hand, a complete proscription of women jurors is violative of constitutional rights. White v. Crook (D. C. Ala. 1966) 251 F.Supp. 401, 408); Miskunas v. Union Carbide Corporation, 7 Cir. 1968, 399 F.2d 847, 850, cert. denied 393 U.S. 1066, 89 S.Ct. 718, 21 L.Ed.2d 709 (denial to wife, but not to husband, of right to recover for loss of consortium). (See, however, Kanowitz, Constitutional Aspects of Sex-based Discrimination in American Law, 48 Neb.L.Review 131, 143-151 (1968). This article, it seems, was written prior to the denial of certiorari in Miskunas); Gruenwald v. Gardner (2nd Cir. 1968) 390 F.2d 591, cert. denied 393 U.S. 982, 89 S.Ct. 456, 21 L.Ed. 2d 445 (women given more favorable treatment in social security benefits than men); United States v. St. Clair (D.C.N.Y. 1968) 291 F.Supp. 122 (men subject, women not, under Selective Service Act); Clarke v. Redeker (D.C. Iowa 1966) 259 F.Supp. 117 (fixing wife's residence by husband's but not the reverse); Heaton v. Bristol (Tex. Civ. App. 1958) 317 S.W.2d 86, cert. denied 359 U.S. 230, 79 S.Ct.

802, 3 L.Ed2d 765 and Allred v. Heaton (Tex Civ. App. 1960) 336 S.W. 2d 251, cert. denied 364 U.S. 517, 81 S.Ct. 293, 5 L.Ed.2d 265 (both involving denial of right of women to attend an all-male state-supported college).'

"Conversely, sex-based classifications have been nullified when no persuasive difference between women and men could be offered to justify the difference in treatment. See, e.g. United States ex rel. Robinson v. York, D. Conn., 1968, 281 F.Supp. 8, involving the invalidation of a statute providing that women, but not men, could be committed to the state farm for indefinite terms exceeding the statutory maximum provided by the substantive statutes under which they were convicted; White v. Crook, M.D., Ala., 1966, 251 F.Supp. 401, declaring unconstitutional a statute excluding women from jury service; Karczewski v. Baltimore and Ohio Railroad Company, D. C., Ill., 1967, 274 F.Supp. 169, overturning the Indiana practice of denying women the right to sue for loss of consortium (cited above).

"In the light of the foregoing, we hold that Mrs. Schattman has failed in her efforts to show that the Regulation in question is unreasonable or arbitrary or not reasonably related to a permissible state objective. To the contrary, we are of the view that the Regulation is shown to be reasonable and rationally related to a permissible state purpose. See Struck v. Secretary of Defense, 9 Cir., 1971 _____F.2d_____, and Miller v. Industrial Commission, 1971, 480 P.2d 565.

"The judgment of the District Court is reversed and the case is remanded with directions to dismiss the complaint." (Pages 16a-20a of the Appendix to the Petition).

Another case in point is *Cooper* v. *Delta Airlines, Inc.*, 274 F.Supp. 781 (E.D.La. 1967), which held that

the refusal of airlines to employ married females as stewardesses did not violate the provisions of the Civil Rights Act of 1964 prohibiting discrimination in employment on grounds of sex. That court held that the Act does not prevent discrimination against married people in favor of single ones and at 274 F.Supp. 783 the court further held:

> "By reading the Act it is plain that Congress did not ban discrimination in employment due to one's marital status and that is the issue in this case. Delta has a right to employ single females and to refuse to employ married females, and this discrimination is in no way limited by the Civil Rights law from a plain reading of the above quoted section."

To the same effect see the case of *Cooper* v. *Doyal*, 205 So.2d 59 (La. App. 1967) *writ ref.* 206 So.2d 97 (La.Sup. 1968) wherein the Court held that Delta's policy of hiring only unmarried stewardesses did not violate the Civil Rights Act but was simply a reasonable and valid condition of employment based upon a logical occupational qualification reasonably necessary to maintain the normal operation of the airline.

The maternity leave policy does not constitute illegal discrimination against Appellee on account of her sex. Said policy is a reasonable and necessary classification of employees and constitutes a bona fide occupational qualification reasonably necessary to the normal operation of the functions of the Texas Employment Commission.

Conclusion

The opinion of the Court of Appeals for the Fifth Circuit is in all things correct and the Petition for a Writ of Certiorari should be refused.

Respectfully submitted,

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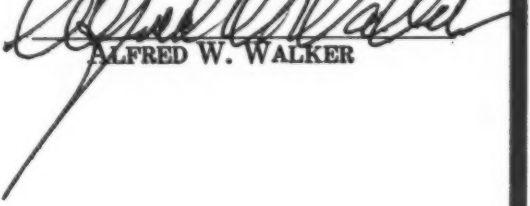
CERTIFICATE OF SERVICE

I, Alfred W. Walker, Executive Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that three copies of the foregoing brief have been forwarded by U. S. Mail, postage prepaid, to the attorneys for Petitioner, Ruth Bader Ginsburg, Melvin L. Wulf and Brenda Feigen Fasteau, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016; Harriet S. Rabb, 435 West 116th Street, New York, New York 10027; and David R. Richards and Michael Schattman, Clinton & Richards, 600 West 7th Street, Austin, Texas 78701.



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